92-40

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MAY TERM, 1992

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

BOB ODOM,
Respondent.

Petition for Writ of Certiorari
to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Illinois state court improperly placed state law procedural burdens upon a federal right of action when it held that the statute of limitations specifically set forth in the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 56, must be pled and proved by the defendant, contrary to an unbroken line of federal cases holding that the FELA statute of limitations is a substantive condition precedent to the action and must be pled and proved by plaintiff.

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceeding appear in the caption of the case, and are Bob Odom, plaintiff-respondent, and Terminal Railroad Association of St. Louis[1/], defendant-petitioner.

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[1/] Terminal Railroad Association of St. Louis is a corporation, without any subsidiaries or affiliates. The Terminal Railroad Association of St. Louis' stockholders are the Burlington Northern Railroad Company, the Union Pacific Railroad Company, the Southern Pacific Railroad Company, the Illinois Central Railroad Company, the CSX Transportation Company, and the Norfolk & Southern Railway Company.

TABLE OF AUTHORITIES

Cases:

Atlantic Coastline R.R. v. Burnette, 239 U.S. 199 (1915) 3,5

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Kichline v. Consolidated Rail Corp., 800 F.2d 356 (3d Cir. 1986) 3

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Townley v. Norfolk & W. Ry., 887 F.2d 498 (4th Cir. 1989) 3

Wilson v. Zapata Off-Shore Co., 939 F.2d 260 (5th Cir. 1991) 3

Statutes:

45 U.S.C. § 56 3,4

REFERENCE TO OPINIONS DELIVERED IN THE CASE

The opinions delivered in the case by the Illinois state courts are as follows: judgment of the Circuit Court for the Twentieth Judicial Circuit of Illinois, Case No. 84-L-701, on February 25, 1988, in the amount of $1,300,000 (Appendix A), the opinion of the Appellate Court of Illinois for the Fifth District, Case No. 5-88-0527 entered on August 23, 1991, as modified on rehearing on December 31, 1991, (Appendix B), and for which Petition for Leave to Appeal to the Supreme Court of Illinois was denied on March 27, 1992 in Case No. 73222 (Appendix C).

STATEMENT OF JURISDICTION

Defendant seeks review of the Illinois Supreme Court's denial of discretionary review of the decision of the Appellate Court of Illinois for the Fifth District, No. 5-88-0527 (Ill. App. Ct. August 23, 1991), as modified on rehearing, (December 31, 1991). *Odom v. Terminal R.R. Ass'n.*, No. 73222 (Ill. Sup. Ct. March 27, 1992). The appellate court opinion affirmed a $1,300,000 judgment entered by the trial court on February 25, 1988 upon a jury verdict. Jurisdiction in this court is based upon 28 U.S.C. §1257(a).

STATUTE INVOLVED

45 U.S.C. §56 provides:

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

STATEMENT OF THE CASE

On August 1, 1984 plaintiff, Bob Odom, filed this FELA (Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*) action against his railroad employer, Terminal Railroad Association of St. Louis (TRRA), alleging that he had sustained noise induced hearing loss as a result of his employment with TRRA as an electrician from 1968 to 1984.

Mr. Odom had seen Dr. John J. Shea, an otolaryngologist, for his complaints of hearing loss in 1978. In 1978, Dr. Shea diagnosed a profound bilateral neurosensory hearing loss and cautioned plaintiff to protect his ears from loud noise. Despite plaintiff's knowledge of his hearing loss as early as 1978, he never pled facts nor presented evidence at trial explaining his six year delay in filing his claim. The case proceeded to trial in February 1988. At trial, plaintiff never contested having knowledge of his hearing loss as early as 1978.

Pursuant to Illinois procedure, defendant moved for a directed verdict both at the close of plaintiff's case as well as at the close of all evidence on the basis that plaintiff's action was not commenced within the time prescribed by the federal statute. (Tr. of Proc., Feb. 25, 1988, pp. 2-6). Both motions were denied by the trial court. (Tr. of Proc., Feb. 25, 1988, p. 6).

The jury returned a verdict in favor of plaintiff in the sum of $1,300,000. Judgment was entered on the verdict the day it was returned. (See Appendix A).

After trial, TRRA discovered that plaintiff had failed to fully and fairly respond to numerous discovery requests concerning medical doctors he had seen concerning his hearing loss problems. Most importantly, the post-trial investigation revealed that plaintiff had failed to disclose Dr. Morris Davidson, an otolaryngologist in Clayton, Missouri, whom he had seen on February 17, 1976. At that time, Dr. Davidson had taken the following history:

> Comes in to see about his hearing. Notices that he has difficulty hearing for the past several years. Much worse when he has a cold. When the cold clear (sic) up he does better. He states his mother had a considerable hearing loss most of her life. He has had no ear infections. Worked around only a moderate amount of loud noise.

Because plaintiff had conceded at trial that he sought medical attention for his hearing loss as early as 1978, and the post-trial evidence indicated that plaintiff's hearing loss began several years before 1976, defendant filed its post-trial motion for plaintiff's failure to timely commence his action under 45 U.S.C. §56. The trial court denied defendant's motion. (Common Law Record, p.2036). Defendant filed a timely notice of appeal to the Appellate Court of Illinois, Fifth District, and later filed its brief again raising plaintiff's failure under § 56. (Common Law Record, pp.2339-41). The appellate court held, on petition for rehearing, that the TRRA had waived the three year statute of limitations, holding:

> In all cases arising under the Federal Employers' Liability Act, procedural matters are governed by the law of the forum. [citation]. In Illinois, statute of limitations are procedural [citation], and defenses raised thereunder are affirmative defenses that must be pleaded and proved by defendant; if they are not, they are waived. [citation].

(See Appendix B). The Illinois appellate court relied solely on Illinois authority in support of its statements.

Defendant filed a Petition for Leave to Appeal to the Illinois Supreme Court which was denied on March 27, 1992. (See Appendix C). This petition follows.

ARGUMENT

Section 56 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, specifically provides:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

The decision by the Illinois state court holding that this statute should be interpreted under Illinois procedural law requires this Court's intervention pursuant to United States Supreme Court Rules 10.1(b) and (c), as it conflicts with an unbroken line of federal authorities, including opinions of this Court, which uniformly state that the statute of limitations provided for under the FELA is a substantive condition precedent which must be pled and proved by plaintiffs.

The need for uniformity in the interpretation of the limitations provision of the FELA has been previously emphasized by this Court. In *Atlantic Coastline R.R. v. Burnette*, 239 U.S. 199, 201 (1915), Justice Holmes writing for this Court noted with respect to the statute of limitations contained in the very same Act involved herein, that if the federal Act "be available in a state court to found a right, and the record shows a lapse of time after which the act says that no action shall be maintained, *the action must fail in the courts of a State as in those of the United States.*" (Emphasis added). This Court has further found that based upon *Burnette*, the statute of limitations under the FELA is a "substantive right, setting a limit to the existence of the obligation which the Act creates." *Engel v. Davenport*, 271 U.S. 33, 38 (1926).

The numerous federal cases since *Burnette* uniformly support the proposition that § 56 of the FELA provides a substantive condition precedent to be pled and proved by the plaintiff. *Emmons v. Southern Pac. Transp. Co.*, 701 F.2d 1112 (5th Cir. 1983); *Fries v. Chicago N.W. Transp. Co.*, 909 F.2d 1092 (7th Cir. 1990); *Kichline v. Consolidated Rail Corp.*, 800 F.2d 356 (3d Cir. 1986); *Townley v. Norfolk & W. Ry.*, 887 F.2d 498 (4th Cir. 1989); *Frasure v. Union Pac. R.R.*, 782 F. Supp. 477 (C.D. Cal. 1991); *Stokes v. Union Pac. R.R.*, 687 F. Supp. 552 (D. Wyo. 1988); *see also Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 266 & n. 9 (5th Cir. 1991) (interpreting the Jones Act provision consistently with the FELA); *Crisman v. Odeco*, 932 F.2d 413, 416 (5th Cir. 1991) (interpreting the Jones Act provision consistently with the FELA); *Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538, 547 (6th Cir. 1986) (interpreting 49 U.S.C. § 11707(e) as a substantial condition precedent which, similar to the FELA, was required to be pled and proved by plaintiff).

Plaintiff's failure to sustain his burden in the case at bar is manifested by the recent Seventh Circuit decision in *Fries*. Like the instant plaintiff, the plaintiff in *Fries* was a railroad worker who claimed hearing loss as a result of industrial noise on his railroad job for the North Western. He testified that he first noted a decline in his hearing in 1981, but it was not until 1985 that a physician related his hearing loss to noise from his railroad job. Nevertheless, plaintiff in *Fries* did not file his FELA action until 1987. The district court entered summary judgment in favor of the railroad and the Seventh Circuit affirmed on the ground that when plaintiff's hearing loss problem first manifested itself in 1981, the plaintiff then had "an affirmative duty to investigate the potential cause of his injury," and his failure to do so did not toll the three year statute of limitations under the FELA. *Fries*, 909 F.2d at 1095; *see also Frasure*, 782 F. Supp. at 480-81.

In the case at bar, plaintiff knew he had a hearing loss problem by 1978 at the latest,[2/] when he was examined by Dr. Shea who performed an audiogram showing plaintiff's neurosensory hearing loss. Dr. Shea's 1978 report recommended that plaintiff protect his ears from loud noise and obtain hearing protection when around loud noise. The plaintiff knew better than anyone else the noise to which he was subjected on the job and under *Fries*, he had "an affirmative duty to investigate the potential cause of his hearing loss injury" at least by 1978. However, suit was not filed for another six years.

The Fifth District Court of Appeals never questioned the result in this case should the applicable federal authorities be applied. Rather, the state court avoided this fatal flaw in plaintiff's case by holding that the statute of limitations had been waived by defendant because under Illinois law statutes of limitation are procedural and the TRRA failed to plead the statute of limitations as an affirmative defense. But as the authorities above show, this case does not involved any statute of limitations prescribed by Illinois law. Rather, it involves the three year limitations period embodied in the very statute creating plaintiff's cause of action, 45 U.S.C § 56. As such, it is a substantive part of the cause of action itself and a "condition precedent to an

[2/] Dr. Davidson's report, which was not disclosed by plaintiff in discovery, showed plaintiff suffered from a severe hearing loss "several years" prior to February 1976. Furthermore, that report shows that Dr. Davidson considered plaintiff's noise exposure at work in attempting to treat plaintiff's condition.

injured employee's recovery in an FELA action," *Emmons v. Southern Pac. Transp. Co.*, 701 F.2d 1112, 1117 (5th Cir. 1983); *see also, Gulf, C. & S.F. Ry. v. McClelland*, 355 F.2d 196, 197 (5th Cir. 1966), and failure to timely bring suit not only bars the claimant's remedy, but also destroys the employer's liability. *Emmons*, 701 F.2d at 1117; *see also, Dixon v. Martin*, 260 F.2d 809, 811 (5th Cir. 1958). Furthermore, since the statute of limitations under the FELA is a substantive part of plaintiff's claim:

> '[T]he *defendant*, therefore, *need not specially plead the defense'*... . The burden is therefore on the claimant to allege and to prove that his cause of action was commenced within the three year period. *Carpenter v. Erie R. Co.*, 132 F.2d 362, 363 (3d Cir. 1942), *cert. denied*, 318 U.S. 788 (1943).

Emmons, 701 F.2d at 117-18, quoting *Goodwin v. Townsend*, 197 F.2d 970, 971 (3d Cir. 1952) (emphasis added). Indeed, the *Emmons* court specifically held that a railroad's failure to raise a limitations defense or plead limitations as an affirmative defense did not waive the issue. *Emmons*, 701 F.2d at 1117. Our research does not reveal any federal or state case that has ever held to the contrary *until the state court opinion in the case at bar.*

CONCLUSION

The state court opinion in this action offends the very basis of *Burnette*: the FELA statute of limitations must be uniformly interpreted so that its application would lead to identical results in federal as well as state court. Currently, actions brought in the state courts of Illinois will lead to different results because of the procedural burdens it has placed on the exercise of this federal substantive right in this case.

To resolve this patent conflict with federal law and the cases thereunder, this Court should review this case.

Respectfully submitted,

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APPENDIX A

State of Illinois
IN THE TWENTIETH JUDICAL CIRCUIT,
ST. CLAIR COUNTY, BELLEVILLE, ILLINOIS

PLAINTIFF: ODOM
vs.
DEFENDANT: TERMINAL

NO. 84-L-701

ORDER

This cause coming before the Court; the Court being fully advised in the premises and having jurisdiction of the subject matter:

The Court finds: upon the return of the jury's verdict judgment for the plaintiff and against the defendant in the sum of $1,300,000.00. Execution stayed pending post trial motion.

Transcript, if ordered, of proceedings to be prepared. Court reporter entitled to a deposit of 1/2 her fee, prior to said transcript preparation. Post trial in 40 days, no enlargement of time by either party.
Hand delivered to the parties in court.

Attorneys:

Enter:

_____
Plaintiff

_____
Defendant

/ s / Roger M. Scrivner
Judge

APPENDIX B
5-88-0527
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

BOB ODOM, Plaintiff-Appellee, v. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a corporation, Defendant-Appellant.	Appeal from the Circuit Court of St. Clair County. No. 84-L-701 Honorable Roger M. Scrivner, Judge Presiding.

ORDER

Plaintiff alleged that while employed by defendant, Terminal Railroad Association of St. Louis, defendant failed to furnish him with a safe place to work, exposing him to noise which caused hearing loss. He sought damages under the Federal Employer's Liability Act. 45 U.S.C. §51 (1984).

The parties agreed that plaintiff had severe and permanent hearing loss rendering plaintiff almost totally deaf, but defendant claimed that plaintiff's loss of hearing was inherited rather than caused by exposure to noise.

A St. Clair County jury returned a $1.3 million verdict for plaintiff. Defendant moved for a new trial, alleging that plaintiff had perpetrated a fraud upon the court. The circuit court granted defendant leave of court to take further discovery to substantiate its request for a new trial. After reviewing all testimony, depositions and documents, the circuit court denied defendant's request for a new trial.

We affirm.

Defendant presents ten issues for review.

I.

Defendant argues that the circuit court erred in refusing to grant a new trial and claims that plaintiff testified falsely during his discovery deposition and intentionally gave false answers to interrogatories. We note that there is no evidence that plaintiff's attorney knew of plaintiff's alleged nondisclosure.

At issue is whether the court erred in refusing to enter judgment in favor of defendant or to grant defendant a new trial because of plaintiff's alleged discovery abuses. The determination whether a party has properly answered interrogatories, as well as impositions of sanctions for noncompliance with discovery rules, is within the circuit court's discretion. *Ferenbach v. DeSyllas* (1977), 45 Ill. App. 3d 599, 359 N.E. 2d 1214; *Bradfield v. Illinois Central Gulf R.R. Co.* (1985), 137 Ill. App. 3d 19, 484 N.E. 2d 365.

The first alleged abuse is plaintiff's failure to disclose Dr. Morris Davidson as a treating doctor in response to defendant's interrogatory. Plaintiff received the interrogatory in 1984.

The interrogatory asked:

> "What are the names and addresses of all doctors who treated you for your hearing loss ***?"

Dr. Davidson testified during post-trial discovery that he examined plaintiff once eight years prior to the interrogatory. Although he performed a hearing test and prepared a report, Davidson did not *treat* plaintiff. As Dr. Davidson testified, there was no medication or treatment program that would have benefited plaintiff's hearing.

Dr. Davidson's testimony reveals that plaintiff answered this interrogatory in good faith when he did not disclose Dr. Davidson as a treating doctor. Evidently, plaintiff was examined by several doctors who were unable to treat him. Plaintiff, in reading and understanding this interrogatory, could have answered this question the only way he knew — that no doctors could treat him.

Dr. Davidson's testimony was cumulative and would not have changed the result of this trial. Dr. Davidson's audiogram was performed in 1976. Plaintiff began working for the Railroad in 1966. At trial, plaintiff introduced his pre-employment medical examination which showed his hearing to be normal. Additionally, plaintiff introduced his military service examination, performed in 1960, which showed his hearing to be normal. Dr. Stroud, defendant's expert, testified that even if plaintiff's hearing loss was hereditary, the noise levels to which he was exposed would have worsened any preexisting condition. Dr. Davidson concluded that the hearing loss could have been consistent with either theory. Therefore, the jury could have inferred that plaintiff's hearing loss was attributable to defendant's lack of due care in failing to provide hearing protection for its employees.

After reviewing the record, we agree with the circuit court that Dr. Davidson's testimony would have been cumulative of the evidence produced by defendant and would not have changed the result of this trial.

Defendant also argues that plaintiff testified falsely during his discovery deposition, of December 4, 1986, when he stated that he had only been treated by Dr. Martin and Dr. Shea and did not mention Dr. Davidson.

The record reveals that the deposition was fraught with difficulty in that plaintiff suffered from severe nerve deafness and was almost deaf. Although plaintiff's limitation was brought to the attention of defense counsel, counsel proceeded to ask questions orally.

Although we cannot condone plaintiff's conduct in failing to disclose Dr. Davidson at the deposition, we are not confident that nondisclosure was intentional, considering that Davidson's examination was more than 10 years earlier, and in view of plaintiff's profound hearing disorder. Dr. Davidson was the only doctor not revealed prior to the 1984 interrogatories and 1986 deposition. Thus, a new trial is not warranted.

Next, defendant alleges that plaintiff failed to identify (1) Dr. Levine and (2) the staff at St. Louis Regional Medical Center in response to its demand for persons having knowledge of relevant facts, filed on October 23, 1987, and February 12, 1988.

Dr. Levine examined plaintiff in June of 1987, at the request of the State of Missouri to verify hearing loss for social welfare purposes. Again, the State agency did not treat plaintiff but simply performed a hearing test to determine the nature and extent of plaintiff's hearing loss.

St. Louis Regional Medical Center initially saw plaintiff because he stepped on a rusty nail. He returned later because welfare asked the center to test plaintiff's hearing to see if he could qualify for assistance. The hearing test showed that plaintiff had a sensorineural hearing loss.

The St. Louis Medical Center's test, even if disclosed at trial, would not have been helpful to defendant because defendant never disputed the extent of plaintiff's injury. Rather, defendant's trial theory was that his hearing loss was hereditary. The circuit court ruled this evidence cumulative; in reality it falls outside the scope of defendant's theory, and therefore, there is no prejudice. The circuit court did not err in exercising its discretion finding these nondisclosures cumulative.

Next, defendant claims that plaintiff failed to disclose Dr. Jerome, who examined Odom on October 23, 1987, and February 12, 1988.

Dr. Jerome was retained by plaintiff's counsel to evaluate plaintiff's condition in preparation for trial. Dr. Jerome was not an expert witness, nor was he called as a witness at trial. Dr. Jerome was a consulting expert.

The provisions of Supreme Court Rule 220 (b) (2) do not require disclosure of a consulting expert. 134 Ill. 2d R. 220 (b) (2).

In conclusion, the record is void of any evidence that plaintiff attempted to mislead or affirmatively conceal any relevant information sought by defendant. Furthermore, the so-called "new" evidence is cumulative. Defendant fully and amply presented its defense of the case through its three medical experts, who testified that plaintiff's hearing loss was hereditary. The jury believed plaintiff's theory. Defendant is not prejudiced.

II.

Next, defendant claims the circuit court erred in not allowing defendant's expert to fully disclose or read to the jury contents of reports which defendant's expert relied upon in formulating his opinion. Defendant's expert, Dr. Stroud, relied upon the 1975 and 1978 reports of Dr. Shea in formulating his opinion that plaintiff's hearing loss was inherited.

Even though reports made by others may be substantively inadmissible, an expert may utilize them in forming his opinion as long as experts in the field reasonably rely on such materials. *Wilson v. Clark* (1981), 84 Ill. 2d 186, 417 N.E. 2d 1322.

Here, however, the record does not support defendant's contention that Dr. Stroud was not allowed to fully disclose to the jury the contents of Dr. Shea's reports. We agree with the circuit court's finding that the contents of the reports were thoroughly reviewed and brought to the jury's attention through direct, cross-, redirect and recross-examination of Dr. Stroud.

Furthermore, defendant made no offer of proof as to Dr. Stroud's testimony. Where an objection to evidence has been sustained, it is proper for counsel to make an offer of proof of what he expects to prove by that question. In the absence of such a showing, it is impossible to determine whether the error committed by the ruling was harmful. *Winslow v. Newlan* (1867), 45 Ill, 145; *Daehler v. Oggoian* (1979), 72 Ill. App. 3d 360, 390 N.E. 2d 417.

III.

Next, defendant alleges error because the circuit court permitted plaintiff's expert, Dr. Stanfield, to testify to and present slides showing audiograms of his other patients with noise-induced hearing loss. Defendant maintains that the doctor's testimony and the slides were not disclosed pursuant to Rule 220. (134 R. 2d 220 (d).) Rule 220 (d) limits the scope of facts and opinions to which an expert may testify at trial to those facts and opinions disclosed during discovery.

The circuit court ruled that this testimony was presented in the previous trial and was not a complete surprise or a total change of the doctor's testimony, and the court allowed plaintiff to use the slides.

Defendant maintained that no one had ever seen a noise-induced case like plaintiff's before. Dr. Stanfield testified that such cases do exist. The demonstrative evidence was used to illustrate the doctor's testimony that such noise-induced hearing losses do exist.

The evidence was relevant and material to the issues of this case. It should have come as no surprise to defendant, as Dr. Stanfield previously testified during the first trial that he had seen many such cases. The circuit court did not abuse its discretion.

IV.

Next, defendant argues that Dr. Stanfield, an audiologist, was not qualified to give his opinion on the cause of plaintiff's hearing loss, because it was beyond his expertise. Counsel made general objections and asked to make a record later. Searching the record, however, we cannot find where counsel made a specific objection, Normally, a general objection is not sufficient to preserve a claim of error for the admission of improper evidence. (*Illinois Central R.R. Co. v. Prickett* (1904), 210 Ill. 140, 71 N.E. 435.) Therefore, this issue is waived.

V.

Defendant claims the circuit court erred in denying defendant's request for a mistrial because of plaintiff's attorney's remarks during closing argument.

Defendant's first argument is that plaintiff's counsel committed prejudicial

error when he made reference to a note passed by plaintiff to plaintiff's counsel.

Plaintiff passed his counsel a note while Mr. Mowe, a railroad electrician, was testifying. During closing argument, counsel referred to this note exchange. Plaintiff's counsel said, "if I'm wrong, you know that I'm wrong, but I thought he [defense counsel] said why didn't Mr. Odom get up and tell Mr. Mowe that he was lying. In the first place, Bob [Odom] couldn't hear. Secondly, when Mr. Mowe got off of the stand Bob wrote me a note and he said to me, 'Mr. Ducey, are they telling the truth?' I wrote back to him and I told him, 'to trust the jury because they are not going to be fooled by defense counsel's argument regarding Mr. Mowe's testimony.'"

This comment was in response to defense counsel's comments regarding Mr. Mowe. Defense counsel, in closing argument, stated:

> "I submit to you for your consideration that if Mr. Mowe was lying about 16 years where he worked * * * that Mr. Odom's counsel would have told Mr. Odom and he would have come up here and he [Odom] would have said my friend, Donald Mowe, * * * is a liar * * * ."

If a party opens the door, he cannot complain about the remarks made by the other party. In the present case, defense counsel opened this area up for comment in his closing argument and cannot object to plaintiff's response. *Lee v. Grand Trunk Western R.R. Co.* (1986), 143 Ill. App. 3d 500, 492 N.E. 2d 1364.

Defendant also argues that plaintiff's counsel's closing argument violated an order *in limine* wherein plaintiff was precluded from suggesting that he was wrongfully discharged. Defense counsel argued that the railroad fired plaintiff because his hearing loss made it dangerous for him to continue to work. Plaintiff's counsel, in response, stated that when the railroad knew plaintiff was going to claim that the railroad was responsible for his hearing loss, they pulled him out of service and fired him for violating their rules. In any event, the court sustained defendant's objection on this point.

Next, defendant argues that defendant was prejudiced when plaintiff's counsel said, "I believe," four times during his closing argument. The use of the word "believe" by plaintiff's counsel appears to be a matter of speaking rather than an attempt to assert counsel's beliefs into the trial. (*See Kemper v. McDougal-Hartman Co.* (1984), 127 Ill. App. 3d 512, 468 N.E. 2d 998.)

Defendant did not object to the statements when made, therefore, this issue is waived.

Finally, defendant argues that plaintiff's counsel appealed to the jury's sympathies by stating that should they see plaintiff on the street after this case, they could smile at him and know they had done the right thing. The circuit court instructed the jury that sympathy had no part in this lawsuit. Defendant also told the jury that their decision should not be based on sympathy.

The circuit court is in a better position to assess any prejudicial impact the argument may have on the jury. (*Kern v. Uregas Service of West Frankfort* (1980), 90 Ill. App. 3d 182, 412 N.E. 2d 1037.) The circuit court stated here that the comments of plaintiff's counsel were within the bounds of proper comment, were not dwelled upon, were not made in an inflammatory manner, and brought no reaction from the jury.

A mistrial should be declared only as the result of some occurrence of such character and magnitude that a party is deprived of the right to a fair trial. The moving party must demonstrate actual prejudice as a result of the ruling or occurrence. *City of Chicago v. Pudlo* (1984), 123 Ill. App. 3d 337, 462, N.E. 2d 494.

We find that the circuit court did not err in denying defendant's motion for a mistrial.

VI.

Defendant argues that the circuit court erred when it denied its motion *in limine* requesting the exclusion of evidence that (1) the Railroad instituted a formal hearing-conservation program after plaintiff was fired, and (2) that hearing tests on defendant's employees indicated that some had sustained hearing loss. The court denied the motion stating that it would take up the issue on an evidentiary basis as it came up in trial.

Defendant did not object to this testimony at the time it was offered and received; therefore, the defendant waived its right to raise the admission of this testimony as error. *People v. VanRiper* (1970), 127 Ill. App. 2d 394, 262 N.E. 2d 141; *Beasley v. Huffman Manufacturing Company* (1981), 97 Ill. App. 3d 1, 422 N.E. 2d 241; *Schaffner v. Chicago & North Western Transportation Co.* (1987), 161 Ill. App. 3d 742, 515 N.E. 2d 298.

VII.

Next, defendant argues the circuit court erred in instructing the jury. The instruction at issue is Illinois Pattern Jury Instruction No. 160.07:

> "It was the duty of the railroad to use ordinary care to provide [plaintiff] [its employees] with reasonably safe and suitable [tools] [machinery and appliances] with which to do [his] [their] work. [Tools] [Machinery and appliances], in order to be reasonably safe and suitable, need not necessarily be the latest or best which could have been provided to do the work." (Illinois Pattern Jury Instructions, Civil, No. 160.07 (2nd ed. 1971) (IPI 160.07)).

The court gave plaintiff's modified version of this instruction. Plaintiff modified this instruction by substituting the word "hearing protection" for the word "tools."

Defendant argues that the modified instruction directed the jury to find for plaintiff on the question of liability and relies on *Lowe v. Norfolk & Western Ry. Co.* (1984), 124 Ill. App. 3d 80, 463 N.E. 2d 792.

In *Lowe* plaintiff modified IPI 160.07 by replacing "tools" or "machinery and appliances" with the words "protective equipment." The court stated that the phrase was too vague. Nevertheless, the court ruled the instruction did not constitute reversible error.

Normally, instructions will be considered as a whole, and where the jury has not been misled and the complaining party's rights have not been prejudiced by minor irregularities, technical errors in instructions will not be deemed grounds for reversal. *Duffy v. Cortessi* (1954), 2 Ill. 2d 511, 119 N.E. 2d 241.

The jury was not misled by this instruction. Reasonable people would infer that "hearing protection" refers to ear plugs or ear muffs. The testimony at trial indicated that defendant possessed ear plugs for employees' use, but failed to provide these plugs to employees. Therefore, we find that the instruction does not constitute error.

VIII.

Defendant argues that the evidence presented by plaintiff is legally insuf-

ficient to support the verdict and that this court should enter judgment in favor of defendant notwithstanding the verdict.

A judgment notwithstanding the verdict will not be granted unless all the evidence, when viewed in its aspect most favorable to opponent, so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill. 2d 494, 229 N.E. 2d 504.

The evidence in this case overwhelmingly favors plaintiff.

Plaintiff worked for the railroad for 18 years. His duties as electrician required him to work around running locomotive engines, grinders, jackhammers, electric drills, sledgehammers, 50-ton air jacks, hucking guns, steel shears, and impact wrenches.

Plaintiff's expert testified that plaintiff, while standing on the catwalk of an engine with the horn sounding, would be exposed to noise levels between 128 decibels and 129 decibels. Dr. Stroud, defendant's expert, testified that if plaintiff were exposed to 100 decibels intermittently it would be sufficient to cause severe neurosensory hearing loss, and that even if plaintiff's hearing loss was inherited, exposure to these levels of noise would cause him additional problems and harm. Various railroad employees testified that they knew plaintiff was losing his hearing but was not given hearing protection.

The record clearly demonstrates that the evidence supports the jury's verdict and the circuit court did not error in denying defendant's motion.

IX.

Defendant argues that the $1.3 million jury verdict is not supported by the evidence and should be set aside or reduced.

An award of damages is excessive and unfair if the amounts fall outside the necessarily flexible limits of fair and reasonable compensation or is so large as to shock the judicial conscience. Damages are particularly within the province of the trier of fact, and a reviewing court will not disturb them on appeal unless obviously the result of passion or prejudice. The reviewing court should examine such factors as the primacy and extent of the injuries suffered, plaintiff's age, the possibility of deterioration in the future, the medical expenses incurred, past and future wage losses, and any restrictions that the injuries may have placed on the daily activities of the plaintiff.

Shaheed v. Chicago Transit Authority (1985), 137 Ill. App. 3d 352, 484 N.E. 2d 542.

The evidence as far as plaintiff's injury and his nonemployability is not contested. Plaintiff was 44 years old when this case was tried. He had a severe hearing loss; auditorily he was nonfunctioning — he could not understand speech. Plaintiff had psychological problems as a result of this hearing loss. He cannot answer the phone, mingle with people, or hear what is said. His speech is deteriorating and will continue to do so. Finally, he is unemployable with past lost wages of $90,454 and present cash value of future lost wages of between $407,045 and $497,499.

We believe the verdict in this case falls within the flexible limits of fair and reasonable compensation.

X.

Defendant argues the circuit court abused its discretion in awarding plaintiff $1,200 for his attorney's post-trial discovery fees and expenses pursuant to section 2-611 of the Code of Civil Procedure. (Ill. Rev. Stat. ch. 110 par. 2-611.) We agree.

In order to recover attorney fees and expenses under section 2-611, a party must prove that a pleading contains untrue allegations not based upon reasonable inquiry. *LaSalle National Bank v. Kissane* (1987), 163 Ill. App. 3d 534, 516 N.E. 2d 790.

Plaintiff's brother, Billy, telephoned defendant's supervisors and told him that he thought his brother's claimed hearing loss occurred before he began working for defendant. The only possible way that defendant could obtain details of Billy's allegations was to bring this information to the attention of the court and obtain an order requiring him to testify at a hearing pursuant to a subpoena.

Further investigation and discovery supported some of Billy's allegations. Therefore, we believe defendant in good faith presented the issue to the circuit court for its determination. We find the circuit court abused its discretion in granting plaintiff's motion for sanctions. The $1,200 assessed damages against defendant are reversed.

The circuit court is affirmed in part and reversed in part.

Affirmed in part and reversed in part.

HOWERTON, J., and RARICK, P.J., concur.

NO. 5-88-0527
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

BOB ODOM, Plaintiff-Appellee, v. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a corporation, Defendant-Appellant.	Appeal from the Circuit Court of St. Clair County. No. 84-L-701 Honorable Roger M. Scrivner, Judge Presiding.

JUSTICE GOLDENHERSH, concurring in part and dissenting in part:

I agree with my colleagues on the disposition of all the issues in the majority order except section X, the trial court's imposition of sanctions pursuant to section 2-611 of the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 110, par. 2-611). On this issue I respectfully dissent.

The position of the majority has some major infirmities. The majority correctly cites *LaSalle National Bank v. Kissane* (1987), 163 Ill. App. 3d 534, 516 N.E. 2d 790, for the proposition on pleading, but fails to cite it for the further proposition that the determination of the trial court is a discretionary decision which is to be given substantial weight by a court of review. As the court in *LaSalle* stated:

> "The decision of whether to award such fees and expenses, and the amount to be awarded, lies within the sound discretion of the trial court. The trial court's decision is given substantial weight, *and it will not be disturbed on review absent a clear showing of an abuse of discretion."* (Emphasis added.) 163 Ill. App. 3d at 542, 516 N.E. 2d at 639-40.

The *LaSalle* court cites *Coronet Insurance Co. v. Booker* (1987), 158 Ill. App. 3d 466, 511 N.E. 2d 793, which quotes extensively from *Embassy/Main Auto Leasing Co. v. C.A.R. Leasing Inc.* (1987), 155 Ill. App. 3d 427, 508 N.E. 2d 331. The *Embassy* case states, in relevant point:

"Section 2-611 provides that a party who pleads falsely shall pay reasonable attorney fees and expenses. (Ill. Rev. Stat. 1983, ch. 110, par. 2-611.) That section has two requirements: (1) the pleading must be made without reasonable cause, and (2) it must be untrue. [Citations.] The movant maintains the burden of proving the two elements required under section 2-611. [Citation.]

Although section 2-611 is penal in nature and must be strictly construed according to its terms [citations], whether to award such fees and expenses, as well as the amount assessed, lies within the sound discretion of the trial court [citation]. The trial court's decision in this matter is entitled to great weight and will not be disturbed unless a clear showing of abuse of discretion is shown. [Citation.] Ordinarily a trial court's decision is not disturbed on review. [Citation.]" 155 Ill. App. 3d at 434, 508 N.E. 2d at 336.

Although the standard of review of this discretionary decision is clear from the authorities, the basis for finding an abuse of discretion in this case is not so clear. The majority argues that defendant had a reasonable basis for its actions after being contacted by plaintiff's brother, Billy, and that the only way defendant could substantiate the contents of Billy's accusations was to proceed with discovery. This argument has two problems. First of all, we must consider the recantation by Billy subsequent to his initial contact and the determination of the trial court that Billy was less than a credible witness. There is also the determination by the trial court that the discovery engaged in subsequent to the amended post-trial motion was unnecessary. Both of these findings are stated in the trial court's order disposing of the amended post-trial motion. That order shows that the trial court fully considered the issues before it and exercised its discretion in a proper manner:

"As to the Request for New Trial as heretofore detailed the same is hereby denied. At best, the Trial Court considers the scant evidence cumulative in nature and the testimony of the Plaintiff's brother as less than credible, all of which is more fully set forth in the record, and therefore, the same is denied.

As to the Request of the Plaintiff for legal services and costs incurred in defending the Request for a New Trial, the court feels that $75.00 an hour is a reasonable hourly rate, in that Defendant's counsel charges its client said hourly rate. Fur-

ther, the Court feels that Defendant's Post[-]Trial Motion regarding a new trial requires sanctions under Section 2-611.

In reviewing Plaintiff's statement for services rendered, the Court feels that Plaintiff was unnecessarily required to attend the depositions of Dr. Morris Davidson, Dr. Jerome, Pat Sherman, James Piles, Dr. L. LeVine, medical records deposition of a Martha Barduniois, and the July 22, 1988[,] hearing in court, which totals the sum of $2,300.00 assessed as damages against the Defendant Terminal Railroad Association of St. Louis. The remaining request for fees and costs by the Plaintiff is denied."

For these reasons, I conclude that the trial court properly exercised its discretion and that defendant has failed to make a clear showing of abuse of discretion.

I would therefore affirm the trial court's award under section 2-611.

NO. 5-88-0527
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

BOB ODOM, Plaintiff-Appellee, v. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a corporation, Defendant-Appellant.	Appeal from the Circuit Court of St. Clair County. No. 84-L-701 Honorable Roger M. Scrivner, Judge Presiding.

SUPPLEMENTAL ORDER ON DENIAL OF REHEARING

Defendant asserts that plaintiff's action is barred by the three-year statute of limitations. (45 U.S.C. §56 (1984).) We disagree. In all cases arising under the Federal Employers' Liability Act, procedural matters are governed by the law of the forum. (*Laird v. Illinois Central Gulf R.R. Co.* (1991), 208 Ill. App. 3d 51, 566 N.E. 2d 944.) In Illinois, statutes of limitations are procedural (*In re Schaefer* (1988), 173 Ill. App. 3d 862, 527 N.E. 2d 961, *appeal denied sub. nom. Schaefer v. Human Rights Comm'n.* (1988), 123 Ill. 2d 566, 535 N.E. 2d 410), and defenses raised thereunder are affirmative defenses that must be pleaded and proved by defendant; if they are not, they are waived. (*Ruddock v. First National Bank* (1990), 201 Ill. App. 3d 907, 559 N.E. 2d 483.) Here, defendant failed to plead the statute of limitations, and the issue is therefore waived on appeal.

Defendant's other assertion in the petition for rehearing is also denied. We affirm our previous order and deny the petition for rehearing.

Order affirmed and petition denied.

HOWERTON, J., with RARICK, J., and GOLDENHERSH, P.J., concurring.

APPENDIX C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
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(217) 782-2035

73222

March 27, 1992

Mr. Richard M. Roessler
Gundlach, Lee, Eggmann, Boyle & Roessler
P.O. Box 692
Belleville, IL 62222

No. 73222 – Bob Odom, respondent, v. Terminal Railroad Association of St. Louis, etc., petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 20, 1992.

Supreme Court, U.S.
FILED
JUL 31 1992
OFFICE OF THE CLERK

(2)

No. 92-40

In The

Supreme Court of the United States

October Term, 1992

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,

Petitioner,

vs.

BOB ODOM,

Respondent.

Petition for Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION

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Petitioner,

vs.

BOB ODOM,

Respondent.

Petition for Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Respondent addresses the Statement of the Case presented by the Petitioner because the same contains not only inaccuracies, but also omissions of pertinent matters by the Petitioner.

The Petitioner makes reference to Dr. John J. Shea and the fact that he saw the Respondent, Bob Odom, in 1978. The Petitioner fails to advise this Court that Dr. Shea did not testify in the trial of this case nor were his records admitted as substantive evidence in said trial. The Petitioner's statements are clearly meant to mislead this Court on this point. In addition, the record to which

the Petitioner refers was a letter of July 6, 1978, in which Dr. Shea wrote in part as follows:

> "You have a very severe high tone sensorineural hearing loss in both ears with poor comprehension probably inherited from your mother and made worse by that train accident in 1971, for which there is no medical or surgical treatment possible." [Defendant's Exhibit 2]

Next the Petitioner states that the Respondent, Bob Odom, did not plead facts nor did he present evidence at trial explaining the reason why suit was filed in 1984 as opposed to 1978. The statement is in error. Bob Odom testified as follows:

> "Q. Did you ever know that noise was causing your hearing loss until Dr. Mortin told you in 1983 or 1984?
>
> A. No, sir." [Vol. VI; R-111]

The Petitioner then makes reference to Dr. Morris Davidson and a certain history he took from the Respondent. Dr. Davidson's medical record is not fully set out by the Petitioner. First, we would note that Dr. Davidson did not testify at trial nor were any records admitted into evidence and, therefore, the Petitioner's reference to Dr. Davidson is not relevant. For the sake of completeness, the medical record of Dr. Davidson, which was not in evidence in this case, was as follows:

> "Comes in to see about his hearing. Notices that he has had difficulty hearing for the past several yrs. Much worse when he has a cold. When the cold cleared up he does better. He states his mother had a considerable hearing loss most of her life. He has had no ear infections. Worked

> around only a mod. amount of loud noise. The nose is straight. Teeth are fair. Tonsils are quite large. NPh clean. Both ears completely normal. Audio as follows: M60 ISO R 20 20 20 30 55 70 90 105 1 L 10 15 35 65 1 1 100 1 1
>
> 25 I I I I 15 20 30 1 1 1 1
>
> Discrimination on the rt at 60db, 16%, and on the left a 55db, 24%. This may be on familial basis. Recheck 1 yr.
>
> [Defendant's Exh. C to Second Amended Post Trial Motion]

Finally, the Illinois Appellate Court, Fifth District in its Supplemental Order on Denial of Rehearing, stated in addition to what the Petitioner has set out the following succeeding sentence:

> "Here, defendant failed to plead the statute of limitations and the issue is therefore waived on appeal."

This sentence clears up the false impression the Petitioner has presented by this omission.

SUMMARY OF ARGUMENT

(1) That when a FELA action is filed in a state court it is subject to the local rules of practice and procedure.

(2) The statute of limitations is an affirmative defense under the rules of practice and procedure in Illinois.

(3) That the Petitioner failed to plead the defense of statute of limitations as an affirmative defense and, therefore, waived the same.

(4) In the alternative, the Plaintiff did prove that he brought his case within the applicable statute of limitations as he did not know that his hearing loss was caused by noise until 1983 and 1984.

(5) That the Plaintiff's Complaint was filed on August 15, 1984, well within the statute.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY THE WRIT WHERE THE ILLINOIS COURTS HAVE CORRECTLY APPLIED THE LAW AND THE PLAINTIFF HAS MET HIS BURDEN OF PROOF.

The Petitioner's argument is two-fold, the first being that the Illinois Appellate Court erred when it ruled that the Petitioner must plead the statute of limitations, and second, that Respondent failed to prove that he brought his action within the three year statute of limitations. We submit that neither argument is well taken.

As to the first point we submit that the Illinois Appellate Court correctly ruled that the Petitioner must plead the statute of limitations as an affirmative defense and that failure to do so waives that defense. This action was tried in a state court and therefore, is subject to the local rules of practice and procedure. See *Chesapeake and Ohio Railway Company v. DeAtley*, 241 U.S. 310. The procedural law in the State of Illinois states that statutes of limitations are procedural and that defenses raised thereunder are affirmative defenses that must be pled by the Defendant and if they are not they are waived. The position of the Appellate Court that the statute of limitations is an affirmative defense is also supported by

Drazan v. United States, 762 F.2d 56 (7th Cir.) and *Ricard v. Elgin, Joliet & Eastern Railway Company*, 750 F.Supp. 372.

The second point raised by the Petitioner is that the Respondent failed to sustain his burden of proof that his case was filed within the applicable statute of limitations which position is not well taken.

The Petitioner bases his argument on Dr. Shea's report of 1978 which as we pointed out earlier was not admitted into evidence nor was his testimony presented to the jury. The only evidence at trial was the Plaintiff's testimony that he did not know that his hearing was caused by noise until 1983 or 1984. The Plaintiff's Complaint was filed on August 15, 1984, well within the three year statute. We would additionally point out that the Petitioner did not submit this issue to the jury thereby waiving a determination by the jury of this issue.

The Petitioner appears to rely on *Fries v. Chicago NW Transportation Co.*, 909 F.2d 1092 (7th Cir. 1990) to support its position. We submit that the *Fries* case is clearly distinguishable from this case and that it is not controlling.

The *Fries* case was one brought for damages for hearing loss under the Federal Employer's Liability Act. In 1980 or 1981 Fries first noticed a decline in his hearing and he began experiencing timitus in either 1981 or 1982. Fries admitted that in 1981 and 1982 the frequency of the ringing would increase toward the end of the workday, worsen throughout the workweek and would only subside after two days of quiet on the weekend. In order to recuperate he needed silence for two hours after returning home from work because he just felt terrible. The District Court found that based upon the above facts, that

Fries either knew or should have known that his hearing loss was caused by noise at work and, therefore, the statute of limitations started to run in 1981 or 1982.

The Court of Appeals stated that Section 56 of FELA provides that no cause of action may be maintained under the statute "unless commenced within three years from the day the cause of action accrued. Accrual is defined in terms of two components, the injury and its cause, for statute of limitations purposes." The evidence in our case is that Odom knew he had a hearing loss at least on July 6, 1978. The Plaintiff testified that he did not know that noise caused or was causing his hearing loss until he was told that by Dr. Mortin in 1983 or 1984. This is all the testimony there was as to the Plaintiff's knowledge about the cause of his hearing loss before 1983 or 1984. There is no evidence in the record that could lead this or any Court to the conclusion that there were facts known to the Plaintiff from which he knew, should have known or should have investigated a causal connection between noise at work and the Plaintiff's hearing loss. The evidence is unquestioned that the Plaintiff did not know that the cause of his hearing loss was noise from work until 1983 or 1984. The lawsuit was filed on August 15, 1984, well within the three year statute of limitations; therefore the Petitioner's position that the Plaintiff failed to prove that this case was brought within the statute of limitations is not well taken.

CONCLUSION

The opinion of the Illinois Appellate Court, Fifth District, should be allowed to stand because the same is in conformity with the applicable facts and law and this Court should deny the Petitioner's petition for the reasons stated herein.

Respectfully submitted,

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